



ABETZ CURTIS  
LAWYERS

DISCUSSION PAPER

# CALCULATING THE ORDINARY TIME RATE OF PAY

83 Davey Street  
Hobart Tasmania Australia 7000  
GPO Box 405  
Hobart Tasmania Australia 7001

Phone 03 6223 8955  
Facsimile 03 6234 9640  
Email [info@abetzcurtis.com.au](mailto:info@abetzcurtis.com.au)  
Web [www.abetzcurtis.com.au](http://www.abetzcurtis.com.au)



## 1. INTRODUCTION

- 1.1. Section 69 of the *Workers Rehabilitation and Compensation Act 1988* (Tas) (the 'Act') prescribes that when a worker suffers a total or partial incapacity for work, supported by a medical certificate, they are entitled to receive weekly payments.
- 1.2. How much a worker receives is determined by the weekly payment rate. This is calculated in accordance with s. 69(1)(a) of the Act, which says the amount payable is whichever is the greater of the following two (2) formulas:
  - (a) Normal Weekly Earnings (s. 69(1)(a)(i)) ('NWE'); and
  - (b) Ordinary Time Rate of Pay (s. 69(1)(a)(ii)) ('OTRP').
- 1.3. This paper takes a look at the OTRP calculation, which is:

*"the ordinary time rate of pay of the worker for the work in which, and for the hours during which, the worker was engaged immediately before the period of incapacity"*
- 1.4. The key inputs for this calculation are:
  - (a) the ordinary time rate of pay of the worker (as set by the applicable Award or enterprise bargaining agreement) "*immediately before the period of incapacity*"; and
  - (b) the hours worked by the worker for the employer "*immediately before the period of incapacity*".
- 1.5. The issue that causes difficulty for employers is the meaning of "*immediately before the period of incapacity*". From the date of incapacity, how far do you count back? Is it 24 hours, 7 days, 14 days or some other period of time?
- 1.6. The purpose of this paper is to highlight the common mistake and set out the correct approach.

## 2. THE COMMON MISTAKE, OTHERWISE KNOWN AS THE PAY PERIOD APPROACH

- 2.1. Unfortunately s. 69 provides little in terms of guidance for determining the period of time you should use for calculating "*the hours during which, the worker was engaged immediately before the period of incapacity*".
- 2.2. Employers tend to focus on the number of hours worked in the **pay period** immediately before the period of incapacity. I call this the '**Pay Period Approach**' and it clearly contradicts the plain reading of the Act because it will almost always ignore some of the hours worked between the last complete Pay Period and the date the incapacity started.



- 2.3. The failings of the Pay Period Approach are best illustrated by the following example:
- (a) the worker's pay period is Thursday to Wednesday inclusive of these days ('Pay Period');
  - (b) the worker has worked only 25 hours for the Pay Period;
  - (c) the worker then works 5 hours on the Friday (i.e. 2 days after the Pay Period), but then injures themselves at the start of their shift on the Saturday;
  - (d) if the employer only takes into account the hours worked in the Pay Period immediately before the period of incapacity then this ignores the hours worked on the Friday, which are hours worked immediately before the period of incapacity.
- 2.4. There is however a place for common sense when considering this, which is touched on by Commissioner Chandler in *F v Thirroul Investments Pty Ltd (T/AS Tonic@217)* [2004] TASWRCT 19. At paragraph 14 of that decision he says that you might ignore a period of three days immediately before a period of incapacity if a worker was absent from work during that period for reasons such as sickness or holidays. However, if that occurred, it would obviously raise questions in relation to causation.

### 3. SO WHAT PERIOD SHOULD YOU USE?

- 3.1. This question was addressed by Underwood J (as he then was) in *Allison v James* [1994] TASSC 122:

*"Identification of the work (if any) in which a worker was engaged immediately before the commencement of any relevant period of incapacity is a question of fact. Determination of that question of fact depends upon all the circumstances of each case and it is impossible to lay down any exhaustive definition applicable to all cases. There must be a close temporal connection between the commencement of the relevant period of incapacity and there must be no relevant "thing" such as retirement, intervening between the last work and the commencement of the period of incapacity. The period of time may be as short as a few hours or as long as some weeks. What work can properly be described as being "immediately before the [commencement] of the period of incapacity" depends on the facts of each case."*

- 3.2. Clearly there is no hard and fast rule. We advise the simplest way to approach it is to look at the last 7 days immediately before the period of incapacity because you are calculating a weekly payment rate, so this is a logical starting point. If this produces a grossly unfair result, for worker or employer, then I would next look at the last 14 days and divide by 2 for a weekly rate.

For further information in relation to the issues discussed in this paper, please contact either Joe Brown or Aaron Hindmarsh.



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